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ERNIE BALL, INC.
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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
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12 ERNIE BALL, INC., a California
13 corporation

14 Plaintiff,

15 v.

16 GAMECHANGER MEDIA, INC., a
17 Delaware corporation and Does 1-10,
inclusive,

18 Defendant.
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Case No.

COMPLAINT FOR DECLARATORY
RELIEF OF NON-INFRINGEMENT
AND NON-DILUTION OF
TRADEMARK

1 **COMPLAINT FOR DECLARATORY RELIEF**

2 Plaintiff, ERNIE BALL, INC. ("EB") brings this action against Defendant,
3 GAMECHANGER MEDIA, INC. and Does 1-10 (hereinafter "GM"), for a
4 judgment declaring that EB's trademark, THE GAME CHANGER, does not
5 infringe upon or dilute GM's purported trademark GAMECHANGER and for other
6 relief. For its Complaint against GM, Plaintiff alleges as follows:

7 **NATURE OF THE ACTION**

8 1. The claims asserted in this Complaint arise under the Lanham Act of
9 the United States, 15 U.S.C. § 1125, et seq., and under the Declaratory Judgment
10 Act, 28 U.S.C. §§ 2201 and 2202, and are brought for a declaration by this court
11 that the Plaintiff EB has not infringed and is not infringing upon or diluting GM's
12 purported trademark GAMECHANGER.

13 **JURISDICTION AND VENUE**

14 2. This court has jurisdiction over the subject matter of this action
15 pursuant to 28 U.S.C. §§ 1331, 1338, 2201, 2202 and 15 U.S.C. § 1121(a), and
16 jurisdiction over the state law claims under 15 U.S.C. § 1367. An actual and
17 justiciable controversy exists between Plaintiff and GM to which Plaintiff requires
18 an immediate and definitive declaration of its rights by this court.

19 3. This court has personal jurisdiction over GM because, on information
20 and belief, GM conducts regular and continuous business in California, including in
21 Riverside County. (See Exhibit "A"). GM further conducts transactions in interstate
22 commerce, namely, by allegedly developing and marketing software applications
23 that are distributed through Apple App Store and are advertised through the
24 Internet.

25 4. Upon information and belief, GM asserts an exclusive right to use the
26 GAMECHANGER mark nationwide, and in California, and on information and
27 belief purports to own a federal registration for the purported trademark
28 GAMECHANGER.

1 5. GM's actions giving rise to this Complaint were purposefully directed
2 towards Plaintiff in California and intended to restrict Plaintiff's activities in
3 interstate commerce, including in California, and otherwise harm EB, which is
4 incorporated in the State of California, and which has its principal place of business
5 in California in this judicial district. GM could reasonably foresee being sued by
6 Plaintiff in the State of California for claims arising from its actions. The exercise
7 of jurisdiction over GM does not offend traditional notions of fair play and
8 substantial justice.

9 6. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and (c).

10 **PARTIES**

11 7. Ernie Ball, Inc. is a corporation organized and existing under the laws
12 of the State of California, having its principal place of business at 53973 Polk
13 Street, Coachella, California 92236, which is within this Judicial District.

14 8. Upon information and belief, GameChanger Media, Inc. is a
15 corporation organized and existing under the laws of the State of Delaware,
16 having its principal place of business at 88 Greenwich Street #2008, New York,
17 New York 10006, and doing business with the State of California and within this
18 Judicial District.

19 9. Plaintiff is ignorant of the true names and capacities of Defendants
20 sued herein as DOES 1- 10, inclusive, and therefore sues these Defendants by such
21 fictitious names. Plaintiff will amend this complaint if appropriate to allege their
22 true names and capacities when ascertained. Plaintiff is informed and believes, and
23 thereon alleges, that each of the fictitiously named Defendants is responsible in
24 some manner for the occurrences herein alleged, and that Plaintiff's injuries herein
25 alleged were proximately caused by their conduct. Plaintiff is informed and
26 believes, and thereon alleges, that at all times herein mentioned, each of the
27 Defendants was the agent and employee of each of the remaining Defendants, and
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1 in doing the things hereinafter alleged, was acting within the course and scope of
2 such agency and employment.

3 **PRELIMINARY ALLEGATIONS**

4 **A. Ernie Ball's "The Game Changer"**

5 10. Plaintiff Ernie Ball, Inc. is a world famous manufacturer of guitars and
6 basses and sells and distributes such products, and related products, such as guitar
7 strings, guitar straps, super locks, hardware parts and cables, guitar pedals, and
8 guitar slides under its brand names ERNIE BALL and MUSIC MAN and THE
9 GAME CHANGER, among others.

10 11. EB owns U.S. Trademark Registration Number 4,150,554 for the mark
11 THE GAME CHANGER for a "programmable electronic control circuit used to
12 manipulate an audio signal in electric stringed musical instruments", registered May
13 29, 2012. EB first used the mark in commerce on March 31, 2012.

14 12. The EB product sold under the mark THE GAME CHANGER is a
15 guitar pickup switching system used to rewire analog guitar and bass pickups by
16 combining any order of pickup coils in series, parallel, forward or reverse phase
17 giving access to an extensive library of never before heard tones. (See Exhibit "B").

18 13. THE GAME CHANGER pickup switching system is installed in and
19 used with the EB reflex® guitar and bass (see Exhibit "C" and "D" respectively).
20 The switching system is accessed directly from the instrument. For advanced
21 functionality, the system can be accessed and programmed by computer and
22 includes the ability to be programmed through an Apple mobile App. (Exhibit "E").
23 The system interface with the computer is by USB jack or midi jack and requires a
24 digital guitar interface such as the type shown on Exhibit "F" hereto.

25 **B. GameChanger Media's "Game Changer"**

26 14. On information and belief, GM purports to own U.S. Trademark
27 Registration Number 3,800,759 for the purported mark GAMECHANGER for use
28 in connection with "computer application software for mobile phones", registered

1 June 8, 2010 and claiming first use in commerce of GAMECHANGER mark was
2 January 1, 2010.

3 15. The GAMECHANGER is, according to GM, a “mobile app and
4 website [that] provide[s] scorekeeping, stats, live GameStreams and recap stories
5 for thousands of amateur baseball, softball, and basketball teams.” (Exhibit “G”).
6 The scope of GM’s GAMECHANGER use of its mark in commerce is limited to
7 this narrow field.

8 **C. The Parties’ Actual and Justiciable Controversy**

9 16. GM asserts by cease and desist letter dated October 23, 2013 that
10 Plaintiff EB’s use of the mark THE GAME CHANGER is likely to cause confusion
11 with GM’s purported trademark GAMECHANGER, and GM further states EB is
12 diluting GM’s mark. GM demands that Plaintiff EB cease and desist use of said
13 mark by October 31, 2013. GM states that if EB continues use of the mark it may
14 be viewed as bad faith and may subject EB to enhanced or punitive damages and
15 implies legal action will ensue.

16 17. GM’s actions have created an objectively reasonable apprehension that
17 GM will continue to assert its unfounded claims of trademark infringement and
18 dilution against Plaintiff now and in the future.

19 18. Plaintiff alleges that GM is acting in bad faith and is liable for misuse
20 of trademark.

21 **COUNT I**

22 ***Declaratory Judgment of EB’s Non-Infringement and Non-Dilution***
23 ***of GM’s GAMECHANGER Mark Under 11 U.S.C. § 1125***

24 19. The preceding paragraphs 1 through 18 of the Complaint are
25 incorporated by reference as if fully set forth herein.

26 20. GM has alleged that EB’s mark THE GAME CHANGER is likely to
27 cause confusion with GM’s GAMECHANGER mark, and asserts that this
28 constitutes trademark infringement and trademark dilution under 11 U.S.C. § 1125.

1 21. Plaintiff alleges there is absolutely **no** likelihood of confusion between
2 the marks and the source of the connected goods and services in commerce, and no
3 infringement or dilution under 11 U.S.C § 1125, or at all, because among other
4 things:

5 (a). Plaintiff Ernie Ball, Inc. is a world famous manufacturer of
6 guitars and basses and sells and distributes related products such as guitar
7 strings, guitar straps, super locks, hardware parts and cable, guitar pedals and
8 guitar slides under its brand names ERNIE BALL, MUSIC MAN and
9 STERLING and THE GAME CHANGER, among others.

10 (b). the goods and services in question of EB and GM are
11 completely different and their nature and source in commerce could not be
12 confused by any consumer. No one would buy an expensive guitar switching
13 system from a famous maker in the industry such as Ernie Ball (whose guitar
14 brand Music Man was started by Leo Fender, one of the original pioneers of
15 the electric guitar and inventor of the iconic Stratocaster®) and mistakenly
16 think it was buying an inexpensive product/service from a sports industry
17 company that provides an app to keep score in amateur baseball, softball and
18 basketball, and vice-versa.

19 (c). there is a very high barrier to any potential confusion. EB
20 Guitars with The Game Changer switching installed are very high end quality
21 instruments that cost in excess of \$2,000 and are not casual purchases. Only
22 discriminating and knowledgeable consumers skilled in music buy these
23 products. In contrast, it appears that most users of the GAMECHANGER
24 sports scoring app use it for free. Furthermore the subscription price for the
25 GAMECHANGER sports scoring app is low, being \$40 a year. (Exhibit
26 "G"). No one looking to purchase a \$40 a year sports app for keeping score
27 in Little League baseball and other amateur sports would confuse this with a
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1 product and service involving a more than \$2,000 guitar with very
2 sophisticated computer switching, and vice-versa.

3 (d). on information and belief there is not, and cannot legitimately
4 be, any proof of actual confusion that anyone has been confused into
5 mistakenly believing that EB's product bearing the mark THE GAME
6 CHANGER is produced or sponsored by GM, nor vice-versa. Nor is it likely
7 or even possible that GM will expand its goods to include selling guitars and
8 providing pickup switching systems for guitars. Indeed, that is not even
9 within the natural zone of expansion.

10 (e). consumers purchasing the goods and services of EB would
11 exercise a high degree of care and discrimination in making their purchase
12 and would not likely be confused as to the source. This is notwithstanding
13 that virtually no sophistication is needed to distinguish the products and their
14 source, given the completely different nature of the goods and services.

15 (f). the trade channels of the marks are different and distinct and
16 discrete. The musical product industry in which EB sells its products and
17 services markets and sells the products in specific channels, including:
18 annual industry wide trade shows; very large online retailers such as
19 Musician's Friend, Guitar Center, and Music 123; in trade magazines;
20 manufacturer websites; and approved dealers. In contrast it appears that
21 GM's amateur sports App is marketed and distributed by word of mouth and
22 through the Internet, in none of the above referenced channels.

23 (g). on information and belief, EB and GM do both have apps for
24 their products and services appearing in the Apple App Store, but there is no
25 likelihood of confusion as it requires a search by an informed user to find the
26 App in question. Furthermore other game changer Apps appear side by side
27 with the Defendant's GAMECHANGER App in the Apple App Store and
28 they are for sports. (See Exhibit "H"). In addition the EB App cannot be

1 used without prior purchase of a guitar or bass with the switching units
2 installed, and requires an additional and special interface not needed for
3 GM's product. (See Exhibit "F").

4 (h). there further is no likelihood of confusion because multiple
5 trademarks are registered with the U.S. Patent and Trademark Office
6 ("USPTO") for GAMECHANGER and/or GAME CHANGER or similar
7 names. The protection afforded to these mark is narrowly related to the
8 goods and services provided thereunder and GM's purported mark is weak.
9 In addition multiple companies use the Game Changer name or a similar
10 name for goods and services that are different and/or in different industries
11 from the Parties.

12 (i). The USPTO has already made a determination that EB's mark
13 THE GAME CHANGER and GM's mark GAMECHANGER can coexist on
14 the Principal Register because the marks are used on unrelated products and
15 there is no likelihood of confusion.

16 (j). EB's trademark application for registration of the mark THE
17 GAME CHANGER, filed after GM's trademark application, was approved
18 by the USPTO and was not refused on the grounds that it could be
19 confusingly similar to GM's registration.

20 (k). In addition to the EB trademark registration and GM trademark
21 registration, a variety of other GAME CHANGER trademarks (about 74
22 records found) peacefully co-exist on the registry for use in connection with
23 services similar to GM's and for other services, which suggests that
24 customers will look to the missing or additional element to distinguish the
25 source of the goods and to avoid confusion. This also shows that protection
26 for the GAMECHANGER mark is weak.

27 (l). A small sample of "game changer" marks on the USPTO
28 Principal Register include: GAME CHANGER (Registration Number

1 4211228), GAMECHANGER (Registration Number 4415610), GAME
2 CHANGER (Registration Number 4408408), GAME CHANGER
3 (Registration Number 4287921), and GAME CHANGER (Registration
4 Number 4368359).

5 (m). there is no dilution of GM's trademark under 15 U.S.C. § 1125,
6 or at all, by EB's use of THE GAME CHANGER for all the reasons set forth
7 hereinabove, and because Plaintiff is informed and believes GM's mark
8 GAMECHANGER is not distinctive, famous, or unique. It is not generally
9 known outside the amateur sports industry. Rather, it is a weak mark
10 narrowly linked to a specific product/service in a specific industry. Indeed,
11 EB is much more famous and unique and well known than GM.

12 22. An actual and justiciable controversy exists as to the claimed
13 infringement and dilution of GM's trademark and GM's actions and claims as set
14 forth hereinabove have placed the Plaintiff in objectively reasonable apprehension
15 of suit.

16 23. Unless declaratory judgment in the Plaintiffs' favor is entered, Plaintiff
17 is informed and believes that GM will continue to assert groundless charges of
18 infringement and dilution and/or will otherwise seek to enforce its asserted
19 trademark rights against Plaintiff and those in privity with Plaintiff, including
20 Plaintiff's customers and prospective customers.

21 24. Accordingly, Plaintiff requests that this court declare that EB's mark
22 THE GAME CHANGER does not infringe upon GM's purported mark, and does
23 not dilute GM's mark, under 11 U.S.C. 1125 or at all.

24 25. Plaintiff requests an award of reasonable attorney fees incurred as
25 allowed by the Lanham act and under California state law, in an amount as
26 determined by the court upon application.

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COUNT II

***Declaratory Judgment of EB's Non-Infringement and Non-Dilution of GM's
GAMECHANGER Mark Under Miscellaneous and Ancillary State Law***

26. The preceding paragraphs 1 through 18 and 20 through 25 of the Complaint are incorporated by reference as if fully set forth herein.

27. As set forth hereinabove, an actual controversy exists as to the claimed infringement and dilution of GM's trademark and GM's actions and claims as set forth hereinabove have placed the Plaintiff in objectively reasonable apprehension of suit.

28. Plaintiff requests that this court declare that EB's mark THE GAME CHANGER does not infringe upon GM's purported mark, and does not dilute GM's mark, and does not violate any trademark rights of GM under California state law.

29. Plaintiff requests an award of reasonable attorney fees incurred as allowed by the Lanham act and under California state law, in an amount as determined by the court upon application.

REQUESTED RELIEF

Wherefore, Plaintiff Ernie Ball, Inc. requests the following relief:

A. that this court declare that Plaintiff does not and has not infringed GM's purported mark GAMECHANGER and that EB's mark THE GAME CHANGER does not infringe upon the purported mark GAMECHANGER;

B. that this court declare that Plaintiff's use of the mark THE GAME CHANGER mark does not dilute GM's purported mark GAMECHANGER under 15 USC § 1125 or at all;

C. that this court declare that EB's mark THE GAME CHANGER does not infringe upon GM's purported mark, and does not dilute GM's mark, and does not violate any trademark rights of GM under California state law;

1 D. that this court enjoin GM from asserting that it has rights in its
2 purported GAMECHANGER trademark to the exclusion of Plaintiff, its
3 representatives, agents, customers, and/or affiliates, present and prospective;

4 E. an award of reasonable attorney fees incurred by Plaintiff as allowed
5 by the Lanham act and under California state law, in an amount as determined by
6 the court upon application;

7 F. an award of costs; and

8 G. that this court grant such further relief as it deems just and proper.

9
10 Dated: October _25, 2013

BEST BEST & KRIEGER LLP

11 By: 

12 G. HENRY WELLES
13 Attorneys for Plaintiff
14 ERNIE BALL, INC.
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